Foenander Lecture 2012

The Review of the Fair Work Act and its Implications.

16 August 2012

[1] It is a great honour to be asked to deliver the Foenander Lecture for 2012. I am grateful to the organisers for their kind invitation to do so. They have taken something of a risk in asking an industrial relations practitioner to deliver an academic lecture. I was only slightly bemused to be told that the lecture is usually delivered by a speaker who is an eminent authority in the field. Perhaps it was the use of the word "usually". Nevertheless I was very happy to accept and to have the opportunity to share some thoughts with you about the current review of the *Fair Work Act 2009*.

[2] Having been involved in workplace relations for 40 years a review of the legislative arrangements is not exactly a novelty and is not as exciting as it once might have been. This review has given rise to debates about policy and regulation of the same kind as many reviews which have preceded it over more than a century. What powers should the national industrial tribunal have, what constraints should be put on the way those powers are used and what limitations should be put on the conduct of the parties, in particular what limits should there be put on industrial action and what limits should there be on the ability of employers to contract with whomever they please on mutually agreed terms? This review differs from previous ones in at least one respect, however. It is taking place in a pre-election period. Usually review and change occurs after an election as part of the implementation of the election platform of the new government. Certainly there have been very few elections in which industrial relations has not been high on the policy agenda. And even if an Opposition does not have a reform platform, there is likely to be a reform bill if the Government changes. Of course politics bedevils good policy formulation in many fields, but it does seem that so far as industrial relations is concerned the problem is more acute than normal.

[3] We are fortunate to have the recently released Report of the Fair Work Act Review Panel. The Report contains a great deal of useful macro-economic data, analysis of a wide range of issues and a large number of recommendations for change. There are 53 recommendations in all. For one whose decisions have routinely been the subject of critical comment, positive and negative, over the last 14 years or so there is a temptation, ever so slight, to turn the tables on the members of the Panel and to critically evaluate their work. But to do so would not only be unhelpful, it would also be disrespectful to three people, each well-credentialed in their field, who have done a professional and balanced job in circumstances where there are strong political and ideological divisions between the major interest groups. My remarks will be confined to some issues relevant to policy formulation in a limited number of areas. The areas are:

- The award system
- Enterprise bargaining
- The role of unions, particularly in bargaining
- Productivity under the Fair Work Act
- Individual flexibility

[4] First a preliminary comment about the well-known paradox of deregulation. The paradox is that successive attempts to deregulate workplace relations have, in many respects, led to increases in regulation. Over the last two decades more and more limits have been placed on the exercise of compulsory arbitration powers. Conditions have been attached to the exercise of the powers which remain. And constraints, which are sometimes quite detailed, have been placed on the behaviour of the parties. Arbitration powers in relation to some matters have been replaced with substantive legislative provisions, such as the National Employment Standards (or NES), and issues of interpretation and application have arisen in relation to those provisions. Some arbitration powers have been replaced with detailed process requirements. The bargaining and industrial action provisions are examples.

[5] Reform has opened up new areas of policy differentiation. Until 20 years ago federal awards and agreements could deal with any matter which pertained to the relations between employers and employees. Since limits were put on award content, and also on agreement content, in 1996, there have been ongoing debates about what the limits should be. The range of matters was narrowed by the Work Choices legislation and widened somewhat in 2009 by the Fair Work Act. A number of submissions to the Review have proposed further changes. Individual remedies for unfair termination of employment, introduced in 1993, are a similar case. There are ongoing issues about access to an unfair dismissal remedy, issues related to employer size, the length and nature of the employment and the circumstances which gave rise to the dismissal. There are also debates about the best way to protect employers from the obligation to defend or settle claims which are clearly unmeritorious and the waste of resources that obligation frequently entails.

[6] What is important, and this will come up again later, is that if you want to place limits on the exercise of powers by the tribunal or on the conduct of the parties this will often lead to greater complexity and, in many cases, more expense for the parties concerned. There will often, although not always, be a negative process and procedure trade-off.

The award system

[7] Are award wages and conditions too high and unfair on employers as a number of employers suggest? There are a number of things to consider. The 122 modern awards only commenced to operate in 2010. It was inevitable that award modernisation would lead to changes in conditions as employers and employees move from the old to the new awards.[1] It was a condition of modernisation that award wages and conditions should be rationalised and that State-based differences should be removed. Where there are increases in conditions under a modern award, transitional arrangements are in place to ameliorate the cost effects. But there are also countervailing reductions in conditions and, in an overall sense, these must be balanced against the increases.

[8] It is also important that modernisation has not had the same impact in every industry. Where award dependence is relatively high – such as in the retail and hospitality industries – cost increases have a greater effect than in industries such as mining and manufacturing. And the experience of employers within a particular industry may differ. To take the retail industry as an example – the working hours and penalty rates in the modern award are not a direct reflection of a particular predecessor award, but an amalgam of provisions found in a number of federal and State awards. Accordingly, the effect on an employer previously under

a State award in Queensland will not be the same as the effect on an employer previously under a State award in New South Wales, or on a Victorian employer previously under a federal award. To return to the essential point, you cannot rationalise and simplify the award system without changing conditions. Although this will mean some cost increases for some employers, there are benefits overall from a simpler, uniform and less prescriptive award system. In its Report the Review Panel refers in turn to a report by Access Economics which assesses the value of the national system to the economy at around half a billion dollars a year over the next 10 years.[2] The negative effects of modernisation experienced by some employers tend to be in the industries with high rates of award dependence and, I suggest, are relatively confined. With the passing of time, and the completion of the transitional process in July 2014, the benefits of the new system will become increasingly apparent.

[9] There are some submissions which focus on the annual minimum wage reviews under the Fair Work Act and suggest that the increases have had negative employment effects. There are proposals that the criteria to be applied in annual wage reviews should be altered to place more emphasis on creating and preserving employment. The Review Panel's Report contains ABS data which suggest that the increase in minimum wages in the last 7 years has been "modest" and that in the last 4 years minimum wages have increased in real terms by 0.4 per cent only. It is arguable that these data do not capture the real influence of the Fair Work Act as only two annual wage reviews had been conducted under it during the period covered by the data. The most recent Annual Wage Review, the third under the Fair Work Act, however, is likely to have a fairly small effect on real growth in minimum wages.

[10] There does not appear to be much evidence to support the view that annual wage review decisions have paid insufficient attention to employment effects. Relatively high minimum wages have been a feature of the Australian economy for decades. Despite that, reliance on award rates of pay has declined to around 15 per cent of the workforce. While employment in industries with high award dependence is more likely to be sensitive to minimum wage increases, it is hard to find quantitative evidence of substantial negative employment effects, even in those industries, in recent years.

[11] While no doubt employers would like wages to be lower than they are, that is to be expected in a system in which the tribunal is required to take a range of factors into account – not just the views of employers.

Enterprise bargaining

[12] It is interesting to explore, as the Review Panel has, what proportion of the workforce is covered by enterprise agreements – given that enterprising bargaining has been a feature of our system for more than 20 years. The data on agreement coverage are a little difficult to interpret, but it can be accepted that around 16 per cent of employees in the private sector are covered by current agreements under the Fair Work Act.[3] A much greater proportion of the public sector workforce is covered by agreements, federal and State. Formal enterprise bargaining in the private sector is not as widespread as might sometimes be assumed.

[13] The Review Panel's Report includes comprehensive data on wages growth. They show that wages have grown at an average rate of round 4½ per cent over the last 15 years. During that period we have generally had strong economic growth, low inflation and

relatively low unemployment. Wage increases have been higher in mining and construction and there have also been some regional differences. While it is likely that unions have taken advantage of their strategic bargaining position in some industries it can be argued that it is legitimate for them to do so in a market-based bargaining system provided the outcomes overall do not threaten economic progress. Nevertheless the Panel has, sensibly with respect, recommended a change in the process for establishing Greenfields agreements. Under the Fair Work Act unions with industrial coverage have automatic bargaining rights in relation to Greenfields agreements. Previously this was not the case and an employer could submit a Greenfields agreement for approval without any union involvement. Neither approach is entirely satisfactory. The Review Panel's recommendation envisages an arbitral intervention where agreement cannot be reached by negotiation.

[14] Changing direction slightly, I want to make some observations about industrial disputation. Industrial action is only permissible during enterprise bargaining and then only in limited circumstances. The Report notes that industrial action as measured by working days lost due to strikes remains at historically low levels. While there was more disputation in 2011 than in 2010, more agreements were being renegotiated in the later year and disputes in the public service in New South Wales, not covered by the Fair Work Act, made a significant contribution to the 2011 figures.

[15] Some commentators emphasise recent increases in days lost to strikes, treating the historical position as largely irrelevant. There have also been suggestions that union militancy is increasing and that the statistics understate the extent of industrial action because they do not record industrial action which does not involve work stoppages, such as bans on overtime or particular types of work. Particular employers may have been subject to more bans than in the past, but so far as I am aware there are no reliable economy-wide data. There may be other reasons, however, for the perception that union militancy is increasing.

[16] Successive reform acts have made the bargaining process more elaborate. And the increasing complexity of industrial action procedures has provided opportunities for unions to increase the negotiating pressure on employers. First, there are a number of steps which must be taken before protected industrial action can be taken. An application must be made for a protected action ballot order, the order must be issued, there must be a ballot, notice must be given of intended industrial action and only then can protected action be taken. A tactic which is sometimes adopted is to give notice of industrial action, causing the employer to spend time and resources on contingency arrangements, but to withdraw the action at the last minute. Secondly, there are other applications which can be made, for a majority support determination or bargaining orders, for example. The legislation contains a series of pressure points in the bargaining process, some inbuilt and others discretionary, which progressively deepen hostilities. It may be that this has played its part in employer perceptions that unions have become more militant.

[17] Certainly if we are to have a free trade union movement it is inevitable that there will be strikes and threats of strikes, otherwise unions would have the status of social clubs. It is rational for unions to attempt to maximise the returns to their members through the application of economic pressure, just as it is for corporations to use their market power to maximise the returns to their shareholders. These are the realities. The question is: how much industrial action is too much? On that question views will differ. Taking the industrial dispute statistics on face value, I am somewhat sceptical of reliance on historical comparisons to downplay current levels of disputation. While we are obviously doing much better than in the

past, community expectations have changed, partly because industrial action has been on the decline almost continuously for the last 20 years; certainly, and ironically, since industrial action became protected in 1993. But no one would suggest that the levels of industrial action which prevailed in the 1970s and 1980s would be acceptable these days. It is desirable to pursue policies which encourage cooperative workplace relations and reduce industrial action, regardless of the historical position.

[18] Nevertheless there are significant limitations on the taking of lawful or protected strike action already. The ACTU has suggested that industrial action is not permitted in relation to some work related claims, the ballot procedures are cumbersome and operate unfairly and industrial action can be suspended or terminated too easily. Many of these restrictions are said to be inconsistent with the right to strike under international law. While there is a case for strengthening the provisions which encourage parties to exhaust negotiations before taking industrial action, in my view it would not be appropriate to place further substantial limitations on industrial action. The ability of unions to take industrial action to advance and protect the interests of their members is currently regarded as one of the defining characteristics of a free society, although of course it was not always the case in Australia.

[19] One of the principal employer objections to the Fair Work Act is that there is no restriction on a union taking protected industrial action when an employer refuses to bargain collectively. The Review Panel has recommended that the law be changed so that a union cannot take protected industrial action against an employer which refuses to bargain unless Fair Work Australia (FWA) has made a majority support determination.[4] If implemented, this proposal would have a significant effect. Any employer could refuse to bargain, unless or until FWA had determined that the majority of the employer's employees did want a collective agreement. This brings me to the next area, the role of unions in enterprise bargaining.

Union role in bargaining

[20] The Report sets out some interesting statistics concerning union membership. It is said that there has been a loss of 1.4 million union members in the last 20 years. In the private sector union members total 1.1 million employees, representing less than 15 per cent of the private sector workforce. Union membership is higher in the public sector and membership overall is around 1.8 million, or under 20 per cent of the workforce. It is not surprising that a relatively low proportion of the workforce is covered by collective enterprise agreements. It is difficult for unions to recruit in some industries because of the high proportion of employees who are casual or part time, patterns of working hours, employer size and geographical dispersion. It may also be that collective approaches to employment issues are less popular these days. The relatively low rate of unemployment could be important, with the Report noting that there was a small spike in union membership during the Global Financial Crisis. It will be interesting to see if there is any significant increase in union membership in a number of European countries in which unemployment has increased in the last 3 years.

[21] There are other factors contributing to the decline in union membership. The union role in the fixation of the safety net has been reduced and the role which remains is probably not well known. Many conditions of employment are now found in legislation, the NES,

rather than in respondency-based awards. There may be some irony in the fact that many of the NES provisions embody principles established by the Australian Industrial Relations Commission in test cases mounted by the trade union movement. The terms of modern awards must be reviewed periodically by FWA and the review is not dependent on union action. The scope for union-initiated alterations to awards between reviews is limited. Another important consideration is that some benefits are provided by legislation which in other countries might be a matter for bargaining. The two most contentious matters in bargaining in the United States are pensions (superannuation) and health care. In Australia those matters don't very often find their way onto the bargaining agenda.

[22] The point is that the role of unions in the establishment and improvement of basic conditions such as superannuation, health insurance, leave and other minimum wages and conditions has changed and the enjoyment of those conditions is not often connected in the public mind with union membership and collective action.

[23] While good economic times are good for the workforce they may not be so good for unions. If our economic fortunes decline, as they are likely to do at some point, if unemployment increases and living costs start to accelerate, union membership is likely to regain some of its former attraction. For that reason, if for no other, it is too early to write unions off as outmoded or confined in appeal to a relatively small sector of the Australian workforce. But in any event, sound public policy should be predicated on a free and healthy trade union movement.

[24] Looking now at enterprise bargaining specifically, a legitimate issue for consideration is whether the Fair Work Act gives unions too much influence in the bargaining process. For example, unions have bargaining representative status, provided they have at least one member that will be covered by the prospective agreement. In relation to Greenfields agreements, unions have automatic bargaining representative status in the area of employment they cover. Should unions should be required to show some greater level of employee membership and support. I referred earlier to the situation in which an employer refuses to bargain at all. Should a union be permitted to take protected industrial action to attempt to persuade the employer to bargain collectively? At the moment it can. The Review Panel has recommended that a union should not be permitted to take action in those circumstances unless it has the support of the majority of the employees to be covered by any agreement which results from collective negotiations. This is an important question with fundamental implications.

[25] Enterprise bargaining is a relatively new development and the role of Australian unions in a decentralised bargaining system is not settled. Historically, Australian unions have recognition and status at the national level. Their certificate of registration has permitted them to represent the class of employees described in their conditions of eligibility for membership.

[26] It is relevant to look at how bargaining is regulated in other countries. Most collective bargaining systems are based on local, as distinct from national, union recognition. The North American systems, for example, are often based on local recognition as the trigger for collective bargaining. It is worth summarising some of the characteristics of those systems. First, the recognition process may take a long time. Secondly the ballot itself is a relatively

minor ingredient in the recognition process, and the pre-ballot campaigning can be extensive. There is potential for litigation about the pre-ballot conduct of the employer, the size and constitution of the bargaining unit i.e. the group to be balloted and other matters. Obviously litigation can be costly, as well as time-consuming. Thirdly, the political activity relating to a recognition ballot can be very divisive and distracting. Finally, the outcome of the ballot is decisive. For the union, failure to gain a majority means it has almost no prospect of achieving a collective agreement. For the employer, if the ballot is lost the obligation to bargain in good faith prohibits conduct which would undermine collective bargaining. The local recognition road can be a very bumpy and expensive one.

[27] It is necessary to balance a number of considerations including the history of our system and the role unions have had in it and the increase in complexity which any additional qualifications for union participation would bring to the bargaining process. If we do go further down the local recognition road, the legislation should ensure that a union which receives majority support is able to enjoy the fruits of victory in the collective sense.

Productivity

[28] I want to deal now with some questions relating to productivity and its place in the workplace relations system. As an opening aside, the word "productivity" is overused and the debate is often crude. At its broadest productivity is used by commentators and others to describe any factor which may impact negatively on the bottom line. It is of course misleading to label any cost arising from industrial regulation as lowering productivity. Productivity is primarily about improving the output from a given level of input or inputs.

[29] It is well known that Australia's multi-factor productivity growth has been stagnating for some years and that in the last few years the recent slow growth in labour productivity has also halted. One of the Panel's central conclusions is that no link can be discerned between changes in the legislative framework and productivity growth. I do not take the Report to be suggesting that there is in fact no link. There are linkages between industrial regulation and productivity but measuring the effects is difficult. As the Report points out, there are many factors which influence productivity and at different times they pull in different directions. Even at industry level it is hard to isolate and measure the effects, positive or negative, of changes in legislation. Perhaps paradoxically, high labour costs can be a spur to productivity improvement. The essential point is that we do not have the data either way about the interaction between the application of the Fair Work Act and movements in productivity. But one thing is shown by the data in the Report: it is not possible to increase productivity simply by changing the nature of industrial regulation.

[30] The Panel received a number of submissions which proposed that the Fair Work Act should be amended to ensure that productivity is directly addressed in the bargaining process. It seems to me that any greater regulation in this area is undesirable. If parties were formally required to take productivity into account in enterprise bargaining, definitional and quantitative issues would arise. In the case of parties who were already having difficulty reaching agreement, any additional requirement would not be helpful. Where parties are in agreement, there would be a temptation to find spurious productivity improvements where none existed in order to satisfy the statutory requirements. Building in further process would be unlikely to yield a net benefit and the Review Panel has resisted that approach.

[31] The Panel has recommended that FWA and the Fair Work Ombudsman initiate programs to encourage parties to adopt measures, particularly in bargaining, which are likely to lead to increased productivity. The view is expressed that there is ample scope under the Fair Work Act for FWA to initiate programs of that general kind and that legislation is unnecessary. This may be correct, although such activities are not mentioned in the list of FWA functions in s.576 of the Fair Work Act. It would be desirable to amend s.576 to put the matter beyond doubt. More importantly, however, programs designed to emphasize the importance of productivity enhancement and to assist the parties to increase productivity should only be undertaken with a reasonable degree of support from employers and employees. ACAS, the Advisory Conciliation and Arbitration Service, in the United Kingdom has many training offerings which are of the general type proposed by the Review Panel, but there is an important difference in the constitution of ACAS. It has a tri-partite governing board. There is therefore broadly based support at the policy level for its training activities. If the training and development functions of FWA are to be expanded, as I think they should be, an equivalent level of bipartisan support is required. Without bipartisan support the activities would be difficult to implement and might jeopardise public perceptions of independence, and ultimately reduce public confidence in the tribunal.

Individual flexibility

[32] The last area is individual flexibility. Awards and enterprise agreements are required to include provision for individual flexibility arrangements, subject to the provision that the employee is better off overall. Unions are concerned to limit these arrangements to prevent them becoming an avenue for avoiding award conditions. Employers are concerned the arrangements are too cumbersome and do not permit real flexibility. The history of individual flexibility arrangements is interesting. Prior to the 1990s, and for a century before, it was unlawful to contract out of award provisions. It was possible to bypass some award provisions, but only if the salary was sufficient to cover the award entitlements. In 1996 statutory individual contracts, Australian Workplace Agreements, were introduced. The theoretical basis for AWAs was to provide greater flexibility in employment arrangements to the mutual advantage of the employer and an individual employee. AWAs were sometimes used to increase individual remuneration above the level generally applying in an award or a collective agreement, sometimes to average out the effect of penalty and overtime payments and sometimes to pay enough to satisfy award entitlements and substitute the employer's remuneration scheme. There is no provision for statutory individual contracts under the Fair Work Act. Some employers maintain that the individual flexibility arrangements should provide the same amount of flexibility as AWAs and that they do not do so. There may be adjustments which could be made to address that issue and I do not want to canvass the Panel's recommendation.

[33] I would like to make just four observations. The first is that the idea of individual flexibility has strong symbolic value as a counter to collectivism. So philosophical differences often cloud the issues. The second observation is that many employers apparently believe that individual flexibility should be a means to reduce award or agreement obligations. While that can be an effect, flexibility should be directed more at mutual benefit arising from the way in which the obligations are carried out in a particular case. If it is suggested that the employer's legal obligations should be reduced that is a different question and one to be addressed at the award level. The third observation is that the importance of

this area may have been exaggerated. The take-up of AWAs was not great. Precise data are hard to find, so I am liable to be corrected, but it is likely that at any one time less than 5 per cent of the workforce was covered by an AWA and the figure was probably closer to 3 per cent. I am excluding the short period during the Work Choices regime when AWAs could undercut award provisions. There were considerably more AWAs during that time. But the point is that the idea of formalised individual arrangements had limited popularity even when AWAs were available. Finally it is sometimes forgotten that it is often possible to make individual over award arrangements which satisfy legal obligations and provide flexibility. This approach has been the one traditionally followed by many employers. Individual contractual arrangements were common in parts of the mining sector, for example, well before AWAs were introduced.

Conclusion

[34] Some concluding comments. The field of workplace relations reform is wide and it has not been possible to do much more than make a few marks across the surface. A few ideas that might shed some dim light on some of the many issues that policy makers have to wrestle with. While I would like to end on an optimistic note, it is hard to do so. Granted employers and unions share much common ground, but experience tells us that it is unlikely that the two sides will join together in the common pursuit of worthwhile economic and social goals. The idea of cooperation between social partners seems a long way off in Australia, at least where critical aspects of the industrial relations system are concerned.

[35] I would like to leave you with a quotation from Professor Sawer, who said of the passage of the *Conciliation and Arbitration Act of 1904*:

> "[The Act] was to have profound effects on the social structure, because of the encouragement it gave to trade union development on a national scale; on the economic structure, because of its consequences for wages and hours fixation; and on politics, because of the periodical party crises caused by attempts to alter the system."[5]

[36] I like that quotation very much because it illustrates how important the industrial relations system is and how wide its impact: social, economic and political.

[37] Once again I thank the organisers for inviting me to speak and thank you all for your attendance and your attention.

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[1] [2009] AIRCFB 800 paras 4 & 5

[2] Report of the Fair Work Act Review Panel, p. 49.

[3] Report pp.57 and 58)

[4] Majority support determinations are dealt with in the Fair Work Act 2009 ss. 236-7.

[5] Australian Federal Politics and Law, 1901 – 1929 (Carlton 1972): Melbourne University Press